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Editor/Publisher:
Harry A. Hammitt
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1624 Dogwood Lane
Lynchburg, VA 24503
434.384.5334
FAX 434.384.8272
email: hhammitt@accessreports.com
website: www.accessreports.com

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Washington Focus: The number of newly classified documents dropped sharply last year, according to the 2012 Annual Report of the Information Security Oversight Office submitted to President Obama June 20. The ISOO report, the number of classification decisions dropped 42 percent from the previous year to 73,477, the lowest level of classification since at least 1989. Further, the number of executive branch officials with original classification authority dropped to 2,326, a new record. According to Secrecy News, the Interagency Security Classification Appeals Panel, which considers appeals of agency mandatory declassification reviews, upheld the agency classification decision in full only eight percent of the time. Although ISCAP only reviewed 163 documents last year, 39 percent of documents were fully declassified while another 53 percent were partially declassified. However, Secrecy News editor Steve Aftergood noted that Obama's directive to process the backlog of 25-year-old historically valuable documents for declassification and public release by December 2013 will not be achieved. ISOO also reported that the cost of classification-related activities was $9.77 billion.

In Camera Review Can't Salvage Agency's Inadequate Claims

Even though Judge James Boasberg voluntarily reviewed nearly 600 pages of responsive records *in camera* in an attempt to determine the justification for substantial withholding claims made by Immigration and Customs Enforcement, he still concluded that the agency has failed to adequately explain its search for records and to provide sufficient justification for its exemption claims under Exemption 5 (privileges) and Exemption 7(E) (investigatory methods and techniques). While Boasberg admitted that many of ICE's claims might well be proper, the lack of sufficiently detailed explanations required him to send the case back to the agency to provide more information to support its processing of the request.

The case involved a request by the American Immigration Council for records pertaining to individuals' access to legal counsel. After waiting two and a half months for the agency to respond, AIC filed suit. ICE then processed

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and produced 1,084 pages and indicated that it had located another 6,000 potentially responsive pages. ICE then processed 6,906 pages in five rolling productions, withholding portions of records under various exemptions. The agency also provided a summary *Vaughn* index to explain his actions. After disclosing the heavily redacted document to AIC, the agency filed its motion for summary judgment. In April, Boasberg ordered the agency to produce the remaining 600 pages of disputed documents for an *in camera* review.

AIC challenged both the adequacy of the agency's search and its exemption claims under Exemption 5 and Exemption 7(E). AIC contended ICE had failed to explain why it did not search certain offices and had not provided sufficient detail of its search to allow the court to assess its reasonableness. Boasberg faulted the agency's explanation for why it had not searched certain offices. He noted that "in order for such a methodology to be sufficient, ICE would, at a minimum, have to aver that it has searched all files likely to contain relevant documents." But, Boasberg pointed out, "Defendants have not indicated that all those offices and records systems likely to contain responsive records have been searched. ICE has only stated that it identified certain offices as 'most likely to possess records responsive to [Plaintiff's] request.'" He added that "while this averment may seem a technical requirement, the facts of this case demonstrate its importance. Plaintiff argues that certain offices, sub-offices, and filing systems should have been searched, but the Court cannot begin to analyze such a contention until it knows ICE's position on whether any of those locations have potentially responsive documents."

Boasberg likewise faulted the agency's explanation of the records it did search. He used the description of an email search as an example, noting that "the supplemental declaration describes searches of the 'Email Outlook program,' but does not explain what is included in this 'program.' In other words, the declaration does not make clear whether these searches encompassed all email from all employees within a particular division, or whether they included only certain employees thought to have relevant information." He further noted that the agency had failed to describe at least three databases from which it had retrieved records. Boasberg indicated that "without a more detailed description of the systems that the agency searched, a question of material fact exists as to whether the search was adequate. Additionally, a more detailed description of the search will help the Court evaluate some of Plaintiff's more specific criticisms. For instance, Plaintiff points out that the search terms the agency employed seem inconsistent and incomplete. The Court will not venture an opinion on this claim without a better understanding of what files were being searched."

Boasberg agreed with AIC that the agency had failed as a general matter to sufficiently support its exemption claims. He noted that "ICE has fallen well short of meeting its obligations and has instead shifted the burden of analyzing nearly 600 pages of withheld documents to the shoulders of this Court. More specifically, at the Court's request, Defendants have submitted the disputed documents for *in camera* review, supplementing them with declarations and briefs that are laden with generalized, categorical descriptions of the contents and conclusions that do little more than parrot established legal standards." Rejecting the sufficiency of its "summary" *Vaughn* Index, he observed that "defendants provide no authority to show that submission of a 'summary' *Vaughn* Index, without more, is either a customary or acceptable means of discharging their evidentiary burden." Noting that courts sometimes did not require an exhaustive explanation when the context of the non-redacted information was sufficient to allow the court to assess the withholdings, Boasberg indicated that "this case is not analogous in any respect. A substantial number of ICE documents that remain in contention have either been heavily redacted or withheld in their entirety. In general, the text that has been made public does not suffice to allow Plaintiff to glean adequate context or engage in the type of advocacy that FOIA seeks to encourage."

Boasberg found the agency's exemption claims lacked necessary information to allow him to assess their validity. He pointed out that so many names of authors and recipients of documents had been redacted that it

was virtually impossible to determine if they qualified as intra- or inter-agency communications. He went on to examine the agency's claims that documents were protected by the deliberative process privilege, attorney-client privilege, or the attorney work-product privilege. He noted that "Defendants have consistently failed to provide the type of information required to discharge their burden of proof under the deliberative-process privilege. Starting with the 'summary' *Vaughn* Index, Defendants have offered perfunctory descriptions that are vague and categorical." He observed that "it may very well be that many of the redacted documents qualify for the protections of Exemption 5 for reasons of deliberative process. . .This Court, however, is not at liberty to draw such conclusions based on mere inference and guesswork." As to attorney work-product claims, he pointed out that "all of Defendants' submissions lump the analyzes of attorney-client and work-product documents together, offering practically indistinguishable justifications for the use of both prongs. These submissions rely on categorical summaries that supposedly apply to multiple, different documents." Dismissing attorney-client privilege claims, he noted that "defendants do not provide any detail to suggest that each exchange involved an attorney or a client, show that the record was premised on a confidential disclosure from the client, offer any indication that the exchanges did not involve any non-clients or 'strangers,' or supply any details to demonstrate that agency counsel acted in a professional legal capacity, as opposed to a managerial or other capacity."

Reviewing the agency's Exemption 7(E) claims, Boasberg indicated that ICE had so far failed to show that the withheld records were created for law enforcement purposes. He observed that to satisfy its burden under 7(E), an agency must "provide a 'relatively detailed justification' for each record that permits the reviewing court to make a meaningful assessment of the redactions and to understand how disclosure would create a reasonably expected risk of circumvention of the law." He noted that "generic portrayals of categories of documents and vaguely formulated descriptions will not suffice." But he pointed out that "defendants' descriptions of its withholdings under Exemption 7(E) exhibit all of the inadequacies that courts in this Circuit have cautioned against. The *Vaughn* Index groups many of the 7(E) withholdings into a single, catchall category for which no page numbers are indicated. The Index also fails to adequately describe the nature of the underlying techniques and procedures, instead offering a laundry list of what may be included 'throughout' the various documents." Boasberg observed that "while past cases indicate that many of Defendants' techniques and procedures are likely to qualify for protection, this Court is under a duty to decide the matter *de novo*, using only the proof submitted by Defendants." (*American Immigration Council v. United States Department of Homeland Security*, Civil Action No. 12-856 (JEB), U.S. District Court for the District of Columbia, June 24)

Views from the States…

The following is a summary of recent developments in state open government litigation and information policy.

Illinois

A court of appeals has ruled that Chicago Mayor Richard Daley waived the deliberative process privilege exemption when he publicly cited and identified a consultants' management study concerning reassignment of police from desk jobs to street patrol. Michael Dumke requested the report from the Chicago police department after it was cited by Daley as the basis for the reassignment of police at a well-publicized press conference. The police denied access based on the deliberative process privilege and also claimed that since the report was maintained by the police only the superintendant of police had the authority to waive the

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exemption. The trial court agreed with the police and Dumke appealed. The appellate court reversed on both counts, although it acknowledged that the issue of whether the deliberative process privilege was waived by Daley was dispositive. Although the police abandoned the claim that the police superintendant was the only one with authority to waive the exemption, the appellate court explained that such a situation could occur in the future and decided to rule on the issue. The court noted that Daley as Mayor of Chicago was the chief executive of the city and that as such he had the power to waive the exemption. The court pointed out that "because the mayor, as the chief executive officer of the City of Chicago is, by definition, the head of the public body at issue and he used, received, and possessed the report, the trial court erred when it found that the mayor could not waive the exemption from disclosure by citing and identifying the report." The court then indicated that the deliberative process exemption was statutorily waived when a document was cited or identified by someone with the authority to do so. The court found it was obvious that Daley had both cited and identified the report in his lengthy press conference. The court observed that "he mentioned and brought forward the report as support for his reorganization plan. . .The legislature has not established a minimum threshold as to what conduct satisfies citation or identification for purposes of [the deliberative process privilege exemption]. Absent any authority to the contrary and in furtherance of the public policy to open governmental records to the light of public scrutiny, we find the public statements made in this case satisfy the 'publicly cite and identify' threshold necessary to constitute a waiver of the [deliberative process privilege exemption]." (*Michael Dumke v. City of Chicago*, No. 1-12-1668, Illinois Appellate Court, First District, Third Division, June 28)

New Mexico

The supreme court has ruled that former Rio Rancho City Manager James Palenick waived his right to sue for back pay when he filed for benefits due upon termination even though he believed the city council had violated the Open Meetings Act when it voted to terminate him. Palenick was hired as city manager in November 2006. His contract provided for six months' severance pay if he was terminated without cause. The city council voted to terminate him in December and he promptly filed for termination benefits, which the city paid. Shortly thereafter, a former mayor of Rio Rancho filed a complaint with the Attorney General's Office alleging the city council's termination of Palenick violated the OMA. The Attorney General found that since city council members had discussed Palenick's termination in private before the December meeting, it violated the OMA and Palenick's termination was invalid. The city council addressed the Attorney General's finding at a November 2007 meeting, ratifying its previous decision to terminate Palenick. Palenick filed suit to collect back pay for the time he was still legally employed by Rio Rancho. The trial court found he had waived his right to bring suit by accepting the original terms of termination, but the court of appeals reversed. The supreme court noted that it was not necessary to rule on whether or not the city council violated the OMA because it was clear that Palenick had waived his right to sue by accepting the termination package. The court pointed out that "at the time that Palenick demanded his severance benefits he believed that the OMA had been violated and that he was still an employee of the City. Despite these beliefs, Palenick's severance demand made no mention of the OMA, his concerns that the OMA had been violated, or that he was not properly terminated." The supreme court added that "based on Palenick's actions it was reasonable for the City to believe that Palenick felt he had been terminated, as of December 13, 2006, was no longer an employee, and was no longer entitled to his salary. . .Palenick's failure to notify the City of the potential OMA violation, Palenick's failure to object to his termination and his demand and acceptance of his severance package amounted to waiver by estoppel." (*James M. Palenick v. City of Rio Rancho*, No. 33,380, New Mexico Supreme Court, June 27)

New York

A court of appeals has ruled that the Town of Richfield Planning Board did not violate the Open Meetings Law when it moved a public meeting concerning construction of a wind turbine project to a larger space to accommodate the number of people who wanted to attend. After a thorough review, the Board found that the project would not violate state environmental laws and issued a special use permit for construction. A citizens' group filed suit to overturn the Board's decision, including a claim that the meeting at which the project was approved was held in violation of the OML. The trial court held that the Board did not violate the environmental laws, but concluded that the meeting violated the OML and nullified the Board's approval of the project. The appeals court, however, affirming the trial court's ruling that the Board had not violated state environmental laws, found that the Board's action to move the meeting to a larger space was not a violation of the OML and, thus, was not subject to nullification. The appellate court noted that "in our view, the Board's efforts at relocating the meeting were aimed at accommodating the large crowd and ensuring public access, and were entirely reasonable under the circumstances." The court observed that "even if we were to agree with [the trial court] that the relocation of the meeting represented a technical violation of the Open Meetings Law, the resolutions issued by the Board at the meeting are 'not void, but, rather, voidable upon good cause shown.' Inasmuch as the Board clearly changed the location of the meeting not to frustrate, but to ensure, the public's attendance at the meeting, and the Board's actions were consistent with the purpose of the Open Meetings Law, we conclude that petitioners have not shown good cause for us to declare void the actions taken by the Board at the November 22 meeting." However, the appeals court found the trial court had properly annulled the special permit because the Board had not adequately informed various state and local agencies of its planned action far enough in advance for them to assess its impact. (*In the Matter of Lawrnece J. Frigault, et al. v. Town of Richfield Planning Board*, New York Supreme Court, Appellate Division, Third Department, June 27)

Pennsylvania

A court of appeals has ruled that West Chester University was not required to keep records pertaining to fringe benefits paid by a contractor for a university project subject to the Prevailing Wage Act. Timothy Browne, the business representative of the local electricians' union, requested the information to determine if the contractor was paying fringe benefits. The university told Browne it did not have the records, but the Office of Open Records decided that the information was related to the contract and that the university was required to obtain the records from the contractor. The court disagreed. Instead, it found that "Contractor's benefits plan is not a 'record' under the Right to Know Law because the plan information does not document a transaction or activity of the University, nor was it created, received or retained by the University. Contractor's employee benefits plan relates only to the relationship between Contractor and its employees, not the relationship between Contractor and the University." The court rejected Browne's argument that the records were implicitly required under the Prevailing Wage Act. The court noted that "because the contract was subject to the Prevailing Wage Act, the University needed to inspect Contractor's certified payroll records to ensure Contractor's employees were receiving the prevailing minimum wage. Those records were required to contain the worker's name, classification, hours worked and actual hourly rate of wage paid, but they were not required to contain information about the contents of a benefits plan." The court added that "the University was required only to ensure that the proper amounts were paid. It is irrelevant how the fringe benefits rate was used; it was only relevant that the employee received the prevailing minimum wage." (*West Chester University of Pennsylvania v. Timothy Browne*, No. 1321 C.D. 2012, Pennsylvania Commonwealth Court, June 19)

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Washington

A trial court has ruled that the City of Shoreline must pay Beth and Doug O'Neill $538,554 in fees and penalties in a case that established that metadata was a public record under the Public Records Act. The case involved a request from the O'Neills for email records pertaining to the author of an email criticizing the city council, which was incorrectly attributed to Beth O'Neill by Deputy Mayor Maggie Fimia. While the O'Neills received a copy of the email, they did not receive metadata showing who had written the email. The case made its way to the Washington Supreme Court, which in 2010 ruled that metadata was subject to the state's access law. (*Beth and Doug O'Neill v. City of Shoreline*, No. 06-2-36983-1 SEA, Washington Superior Court, King County, June 28)

The Federal Courts…

Judge Royce Lamberth has ruled that the California High Speed Rail Authority acted as an agency consultant for purposes of **Exemption 5 (privileges)** when it worked closely with the Federal Railroad Administration to develop environmental impact statements for California's proposed high-speed rail project that would satisfy both federal and state environmental regulations. After FRA denied records under Exemption 5, Judicial Watch sued, arguing that CHSRA did not qualify as an "intra-agency" consultant under the Supreme Court's ruling in *Klamath v. Dept of Interior* because its interests were potentially adverse to those of FRA. After a close examination of the D.C. Circuit's pre-*Klamath* decisions concluding that outside advice could be protected if it aided the agency's deliberative process, Lamberth noted that the Supreme Court in *Klamath* "held that no matter how far 'intra-agency' can be stretched, it cannot be stretched so far as to include communications with interested parties seeking a government benefit at the expense of other applicants." But he then observed that "while *Klamath* put an outer bound on the reach of Exemption 5 and mandated that courts give weight to the 'inter-agency or intra-agency' requirement, it does not entirely undermine our circuit's pre-*Klamath* precedent. I cannot prune our circuit's rule further than the Supreme Court requires. While this Court can no longer merge the threshold requirement with the deliberative process requirement and thereby disregard it, this Court is also not at liberty to give it more than the minimal attention that *Klamath* demands. Our circuit has allowed any communication that aids the agency's deliberative process to be protected as 'intra-agency.' *Klamath* only modifies this by requiring that we not protect communications with interested parties seeking a government benefit that is adverse to others seeking that benefit." He indicated that "combining these cases produces the following rule in our circuit: When communications between an agency and a non-agency aid the agency's decision-making process and the non-agency did not have an outside interest in obtaining a benefit that is at the expense of competitors, the communication must be considered an intra-agency communication for purposes of FOIA Exemption 5. When this rule is applied to the case at hand, the court has no other option but to consider the documents 'intra-agency' and protect them from disclosure." Lamberth rejected Judicial Watch's argument that California's interests were adverse to those of FRA. Instead, he pointed out that "here, CHSRA's communications do not directly advocate for the benefits California seeks from the project. They merely assist FRA to meet its obligations under [federal environmental statutes]. Moreover, FRA's deliberative process did not concern whether to grant the benefits California seeks, it concerned what route alternative would leave the least environmental impact." Further, he pointed out that "the benefits CHSRA sought do not appear to have been adverse to other parties' interests. . .[T]here is no evidence of a competitive application procedure and no indication that the communications of which the plaintiff seeks disclosure might somehow have persuaded FRA to choose California as the object of its assistance over other competitors." Lamberth also noted that "CHSRA and FRA's relationship was formed pursuant to statute." He observed that "when a relationship between an agency and a non-agency is presumed under statute, courts have even greater support for protecting the resulting communications." (*Judicial Watch,*

Inc. v. U.S. Department of Transportation, Civil Action No. 12-0324 (RCL), U.S. District Court for the District of Columbia, June 24)

A federal magistrate judge in California has enjoined U.S. Citizenship and Immigration Services from withholding interview notes taken by Asylum Officers when they interviewed 10 of immigration attorney Jeffrey Martins' clients under **Exemption 5 (deliberative process privilege)**. Although Martins was able to get much of the information in his clients "A-File," the agency withheld the asylum officers' interview notes as deliberative. Martins filed suit based on 10 FOIA requests where interview notes had been withheld, arguing that the agency's regulations indicated that the notes were to contain an accurate record of the interview and were not to include any personal observations. Magistrate Judge Laurel Beeler found that Martins had shown a likelihood of succeeding on the merits since the agency's opposition to his motion did not even claim Exemption 5, but instead urged Beeler to require a *Vaughn* index for purposes of deciding whether records should be disclosed. Assessing the merits of Martins' claim, Beeler noted that "although the interview notes clearly are predecisional (because the interview takes place and the interview notes are taken before a determination is made whether to grant an interviewee asylum), Mr. Martins has put forth a credible argument, supported by authority, that the notes are not deliberative because they most likely are near-verbatim transcripts of the interview and most likely contain only factual material and do not contain the Asylum Officers' subjective opinions or Defendants' deliberative process about whether to grant asylum to the interviewee." Beeler pointed out that Martins had provided uncontested evidence that Asylum Officers "are trained to take notes that are clear, accurate, detailed, and objective and that do not include the Officers' subjective opinions, suppositions, or personal inferences." She added that "Martins also submitted interview notes that he has received in response to past FOIA requests and that appear largely to be near-verbatim transcripts of the interviews. . ." While finding that Martins would suffer irreparable harm because he would not be able to represent his clients properly, Beeler also indicated that disclosure of the interview notes was in the public interest. She indicated that "the public has an interest in defendants' performance of [its duty to grant asylum]. The court agrees with Mr. Martins that release of the interview notes will allow him to determine whether Defendants' decision to deny asylum may have been based on misunderstandings during his clients' interviews." While Martins asked for immediate disclosure, Beeler decided that allowing the agency to provide a *Vaughn* index for the documents was the proper way to proceed. But she pointed out that "if the notes are similar to the examples in the record, it is the court's holding that the notes are not subject to the deliberative process privilege, and the court does not expect them (or, at minimum, the facts in them) to be withheld on that ground." (*Jeffrey Martins v. United States Citizenship and Immigration Services*, Civil Action No. C 13-00591 LB, U.S. District Court for the Northern District of California, July 3)

A federal court in California has ruled that the FBI has not shown that it conducted an **adequate search** for records concerning the Occupy Wall Street movement and that it failed to provide sufficient justification for a number of its exemption claims. The ACLU and the *San Francisco Bay Guardian* requested the documents. The FBI provided expedited processing, but after hearing nothing more for two months, the plaintiffs filed suit. The FBI eventually found 37 pages and withheld 24 entirely. It also disclosed six of 13 pages that originated with the Coast Guard. The plaintiffs argued that both the search and the exemption claims were inadequate. Judge Susan Illston agreed. She found the agency's explanation as to why it limited its search to its central records database unconvincing and pointed out that the agency "does not explain which records systems are not indexed to the CRS, and only makes conclusory assertions that the CRS is the system 'most likely to contain records responsive to plaintiffs' request' and that it is 'reasonable to assume' that a search of the CRS is sufficient." Illston noted that the FBI admitted that it shared intelligence with local law enforcement agencies and observed that "this indicates that the FBI had intelligence to share. But no

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intelligence about the Occupy protestors in Oakland [California] was found by the search. The Court finds that the FBI has failed to adequately explain why the search failed to uncover this information." Turning to the agency's **Exemption 1 (national security)** and **Exemption 7 (law enforcement records)** claims, Illston primarily faulted the agency for failing to explain why withheld information was protected. She noted that "the national security harms that the FBI asserts may stem from revealing the source are merely general harms, such as causing other sources to fear that their identities will be revealed. However, the FBI fails to assert how the revelation of this particular source will specifically harm national security." On **Exemption 7(C) (invasion of privacy concerning law enforcement records)**, she questioned the agency's redaction of information on third parties. She pointed out that "the FBI provided no information specific to these third parties that allows the Court to weigh the privacy interests against the public interest. . . For example, the identities of many Occupy protestors and local police officers were covered extensively by the news media. These persons' privacy interests will be less than other individuals who have not become public figures. But the FBI's general statements and conclusions do not allow the Court to balance these interests." She rejected the FBI's claims for implicit confidentiality of sources under **Exemption 7(D) (confidential sources)**, noting that "the FBI in the instant case has failed to provide any probative evidence that there were express or implied assurances of confidentiality. The [author of the agency's affidavit] has no personal knowledge of the facts. While it may be 'evident from the face of the documents' to him that the sources were expressly assured confidentiality, it is not evident to the Court or to plaintiffs." The plaintiffs contended the Coast Guard had improperly withheld some of its records on the basis that they were non-responsive. To address that contention, Illston indicated that "the Court will review the non-responsive redactions. . .and will only uphold redactions if it is utterly convinced that they do not shed light on, amplify, or enlarge upon that responsive information." (*American Civil Liberties Union & San Francisco Bay Guardian v. Federal Bureau of Investigation*, Civil Action No. 12-03728-SI, U.S. District Court for the Northern District of California, July 1)

The Fifth Circuit has ruled that Mark Batton is entitled to **attorney's fees** for his suit against the IRS and has reversed the district court's finding that the attorney's fees amendments contained in the OPEN Government Act did not apply because he had filed suit before their effective date. After waiting a year without a substantive response from the IRS, Batton filed suit in September 2007. However, he did not properly serve the Justice Department until January 2008. The fee amendments in the OPEN Government Act became effective on December 31, 2007. The district court concluded Batton had filed suit before the OGA went into effect and dismissed his motion for attorney's fees. The Fifth Circuit reversed, noting that "unlike cases that refused to apply the OGA because all of the events necessary for liability took place before the OGA's effective date, here, most of the relevant events took place after the effective date. . .[O]ther than the original FOIA request and the filing of the lawsuit, all relevant events took place after the OGA's effective date. We conclude that the OGA applies to this case." The court pointed out that "applying the OGA, however, leads us to conclude that Batton substantially prevailed. . .Only after he filed and served this lawsuit did the IRS first begin to produce a fraction of the responsive documents, with reticence to provide even a *Vaughn* index. The remaining documents still were not produced for years following further litigation." The court sent the case back to the district court to determine whether Batton was entitled to fees. The court observed that "although the district court mentioned the entitlement factors in passing, its conclusion that Batton was ineligible for attorney's fees did not require the thorough consideration of the entitlement factors which is now necessary." (*Mark E. Batton v. Internal Revenue Service*, No. 12-20401, U.S. Court of Appeals for the Fifth Circuit, June 20)

Judge Richard Roberts has ruled that the FBI conducted an **adequate search** for records concerning the alleged harassment of Rory Walsh by FBI agents at the behest of his former Marine commandant, but that the agency has not shown that the name of the resident agent in charge of the FBI's Harrisburg Office is protected

by **Exemption 7(C) (invasion of privacy concerning law enforcement records)**. Walsh filed suit after the FBI failed to locate any records concerning Walsh's claims of harassment. Noting that the FBI searched for records using Walsh's birth date and several variations of his name, Roberts observed that "despite the FBI's unsuccessful effort to get from Walsh more identifying information that would enable a reasonable search for responsive records, the FBI resourcefully used information it gleaned from Walsh's submissions in this case to conduct an appropriate, reasonable search to find the information Walsh sought." Turning to the privacy claim, however, Roberts dismissed the agency's argument. He noted that "even if FBI redaction policy rather than the text of the FOIA and binding case law interpreting it set the standard for measuring proper application of FOIA exemptions, the FBI has not demonstrated that withholding the names of these agents was even consistent with the FBI's own policy. . .[The agency's] website does not conceal the identities of all former supervisory agents in charge of the Harrisburg office. . .And it is not clear at all that the risk of harassment of the head of an office elevates that agent's privacy interests above the public interest in disclosing his or her identity. It is especially uncertain since the FBI presents no evidence that it conceals the names of the agents who head its resident agencies and field offices." Roberts added that "that is information that would intuitively seem to be public anyway and not shielded otherwise by FBI practices." (*Rory Walsh v. Federal Bureau of Investigation*, Civil Action No. 11-2214 (RWR), U.S. District Court for the District of Columbia, July 3)

A federal court in New York has ruled that the TSA and the Bureau of Prisons have not yet shown that they conducted an **adequate search** for records in response to Corey Davis' FOIA request and that BOP failed to show that staff members who submitted affidavits had personal knowledge of the processing of Davis' request. Davis asked for information about a flight from Dallas that went to Cleveland and then on to New York on March 27 or 28, 2006. TSA responded that it had not been able to search for such records. Noting that TSA had failed to follow DHS procedures for searching, the court pointed out that "plaintiff's request—seeking specific information from a limited range of dates—appears to describe the records he sought in sufficient detail to enable the TSA to locate them with a reasonable amount of effort. Moreover, the TSA was required, under DHS's FOIA regulations, to tell plaintiff what additional information was needed or why plaintiff's request was insufficient. The submissions from the TSA make clear that no such correspondence took place." Davis asked BOP for video or audio recordings. BOP said video for some of the requested time period had been routinely deleted and recycled. But as to video and audio recordings for dates still in BOP's possession, the court noted that "these records are within the possession of [BOP] and the BOP asserts no basis for withholding them. Accordingly, the BOP is directed to release any of these recordings to plaintiff that have not yet been released." The court rejected two affidavits submitted by BOP. The court observed that "the [author of the affidavit] attests to familiarity with the procedures regarding the processing of FOIA requests, but says nothing about her personal knowledge or familiarity with the documents in question. Indeed, she asserts no basis for competency to testify about the BOP's handling of *plaintiff's* request, other than to say she reviewed the Complaint and the Amended Complaint." (*Corey Davis v. Unites States Department of Homeland Security, et al.*, Civil Action No. 11-CV-203 (ARR)(VMS), U.S. District Court for the Eastern District of New York, June 27)

Judge John Bates has ruled that Adam Wetzel does not have **standing** to bring a FOIA suit against the Department of Veterans Affairs because two duplicative FOIA requests by his attorneys failed to indicate that they were requesting information about litigation concerning his VA loan on his behalf. Attorney Charles Daugherty requested legal documents about Wetzel's VA-funded purchase of a condominium, but nowhere indicated that he was making the request on Wetzel's behalf. Another attorney in the firm, Jimmy Ray Howell, made an identical request, and, while the request referenced Wetzel's litigation, it also failed to

specify that it was made on Wetzel's behalf. When Wetzel brought suit under FOIA, the agency argued he did not have standing. Bates first observed that "if a party has not made a request within the meaning of FOIA, then he does not have standing to bring a lawsuit. Consistent with this principle, courts routinely dismiss FOIA cases for lack of standing by a plaintiff where plaintiff's counsel submitted a request without including the plaintiff's name or clearly indicating that the request was filed on the plaintiff's behalf." Bates then noted that "Wetzel's signature does not appear on either Daugherty or Howell's request. And neither request states that it was filed on Wetzel's behalf. True, his name is mentioned in the requests, and there is some indication of a representational relationship between the requestors and Wetzel. But that is not enough." Bates pointed out that "the relevant documents submitted by Daugherty and Howell cannot reasonably be construed as requests by Wetzel. At most, the requests indicate that Wetzel, too, has an interest in the information. But many people might have some interest in the information requested through FOIA. Such an interest, alone, is insufficient to create standing." Bates admitted that "the distinction between a request clearly made on a plaintiff's behalf and one not sufficiently clear might, at the margins, appear thin." But he observed that "a line must be drawn to assure that the 'request' requirement does not devolve into a general interest inquiry. Moreover, dismissals on this basis are entirely preventable. All that this suit required was for Wetzel's attorneys to list Wetzel's name as that of the 'requestor,' or to clearly state in the body of the request that it was made on Wetzel's behalf." (*Adam Wetzel v. United States Department of Veterans Affairs*, Civil Action No. 12-1341 (JDB), U.S. District Court for the District of Columbia, June 11)

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